

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROMAN KEVILLY,

Petitioner,

-v.-

**MEMORANDUM OF DECISION
AND ORDER**

04-CV-4309

SUSAN A. CONNELL, Superintendent,
Oneida Correctional Facility,

Respondent.

Appearances:

Roman Kevilly, *pro se*

97A0654

Oneida Correctional Facility

6100 School Road

P.O. Box 4580

Rome, NY 13440-4580

Nassau County District Attorney

262 Old Country Road

Mineola, New York 11501

By: A.D.A. Margaret E. Mainusch, A.D.A. Lawrence J. Schwarz

HURLEY, District Judge:

On October 5, 2004, Roman Kevilly (“Kevilly” or “Petitioner”) filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. Presently before the Court is Respondent’s motion to dismiss the petition as untimely.

Although Petitioner labeled the petition under 28 U.S.C. § 2241, a review of the petition indicates that Petitioner is challenging the imposition of his sentence, pursuant to 28 U.S.C. § 2254. Accordingly, the Court will treat the petition as brought pursuant to Section 2254. *See Cook v. New York State Div. of Parole*, 321 F.3d 274, 277-78 (2d Cir. 2003). Because the Court is treating the petition as one brought pursuant to Section 2254, it must provide Petitioner with the opportunity to withdraw the petition. *Id.* at 282. Accordingly, Petitioner has thirty (30) days

from the date of this order to inform the Court whether he is withdrawing his petition or continuing under Section 2254. Should Petitioner chose to continue with the petition under Section 2254, the Court will then address Respondent's motion to dismiss.

SO ORDERED.

Dated: Central Islip, N.Y.
April 18, 2005

_____/s_____
Denis R. Hurley,
United States District Judge